

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Case No. 2:16-cr-00046-PAL-GMN

Plaintiff,

ORDER

v.

(Mot. Sever – ECF No. 550)

STEVEN STEWART,

Defendant.

Before the court is Defendant Steven Stewart's ("Stewart") Motion to Sever (ECF No. 550) which was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) and LR IB 1-3. The court has considered the motion, the Government's Response (ECF No. 579), Stewart's Reply (ECF No. 605), the Government's Motion to Supplement its Responses (ECF No. 971), and Stewart's Response (ECF No. 1047).

BACKGROUND

I. The Indictment

Defendant Stewart and 18 co-defendants are charged in a Superseding Indictment (ECF No. 27) returned March 2, 2016. Stewart is charged in 11 counts with:

- Count One – Conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371. This charge arises from conduct that allegedly occurred sometime between March of 2014 and March 2, 2016.
- Count Two – Conspiracy to impede or injure a federal officer in violation of 18 U.S.C. § 372. This charge arises from conduct that allegedly occurred sometime between March of 2014 and March 2, 2016.
- Count Three – Use and carry of a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred sometime between March of 2014 and March 2, 2016.
- Count Five – Assault on a federal officer in violation of 18 U.S.C. § 111(a)(1), (b) and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.

- 1 • Count Six – Use and carry of a firearm in relation to a crime of violence in violation of 18
2 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on April
3 12, 2014.
- 4 • Count Eight – Threatening a federal law enforcement officer in violation of 18 U.S.C.
5 § 115(a)(1)(B) and § 2. This charge arises from conduct that allegedly occurred on April
6 12, 2014.
- 7 • Count Nine – Use and carry of a firearm in relation to a crime of violence in violation of
8 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on
9 April 12, 2014.
- 10 • Count Twelve – Obstruction of the due administration of justice in violation of 18 U.S.C.
11 § 1503 and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.
- 12 • Count Fourteen – Interference with interstate commerce by extortion in violation of 18
13 U.S.C. § 1951 and § 2. This charge arises from conduct that allegedly on April 12, 2014.
- 14 • Count Fifteen – Use and carry of a firearm in relation to a crime of violence in violation of
15 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on
16 April 12, 2014.
- 17 • Count Sixteen – Interstate travel in aid of extortion in violation of 18 U.S.C. § 1952 and
18 § 2. This charge arises from conduct that allegedly occurred sometime between April 5,
19 2014 and April 12, 2016.

20 The Superseding Indictment (ECF No. 27) in this case arises out of a series of events
21 related to a Bureau of Land Management (“BLM”) impoundment of Cliven Bundy’s cattle
22 following a two-decade-long battle with the federal government. Beginning in 1993, Cliven
23 Bundy continued to graze cattle on land commonly referred to as the “Bunkerville Allotment”
24 without paying required grazing fees or obtaining required permits. The United States initiated
25 civil litigation against Cliven Bundy in 1998 in the United States District Court for the District of
26 Nevada. The court found that Cliven Bundy had engaged in unauthorized and unlawful grazing
27 of his livestock on property owned by the United States and administered by the Department of
28 the Interior through the BLM. The court permanently enjoined Cliven Bundy from grazing his
livestock on the Allotment, ordered him to remove them, and authorized the BLM to impound any
unauthorized cattle. Bundy did not remove his cattle or comply with the court’s order and
injunction. The United States went back to court. Subsequent orders were entered in 1999 and
2013 by different judges in this district permanently enjoining Bundy from trespassing on the
Allotment and land administered by the Nevada Park Service (“NPS”) in the Lake Mead National

1 Recreation Area¹, ordering Bundy to remove his cattle, and explicitly authorizing the United States
2 to seize, remove, and impound any of Bundy's cattle for future trespasses, provided that written
3 notice was given to Bundy.

4 On February 17, 2014, the BLM entered into a contract with a civilian contractor in Utah
5 to round up and gather Bundy's trespass cattle. BLM developed an impoundment plan to establish
6 a base of operations on public lands near Bunkerville, Nevada, about 7 miles from the Bundy ranch
7 in an area commonly referred to as the Toquop Wash. On March 20, 2014, BLM also entered into
8 a contract with an auctioneer in Utah who was to sell impounded cattle at a public sale. Bundy
9 was formally notified that impoundment operations would take place on March 14, 2014. The
10 following day, Bundy allegedly threatened to interfere with the impoundment operation by stating
11 publicly that he was "ready to do battle" with the BLM, and would "do whatever it takes" to protect
12 "his property." The superseding indictment alleges that after being notified that BLM intended to
13 impound his cattle, Bundy began to threaten to interfere with the impoundment operation, and
14 made public statements he intended to organize people to come to Nevada in a "range war" with
15 BLM and would do whatever it took to protect his cattle and property.

16 The superseding indictment alleges that, beginning in March 2014, the 19 defendants
17 charged in this case planned, organized, conspired, led and/or participated as followers and
18 gunmen in a massive armed assault against federal law enforcement officers to threaten, intimidate,
19 and extort the officers into abandoning approximately 400 head of cattle owned by Cliven Bundy.
20 The removal and impoundment operation began on April 5, 2014. On April 12, 2014, defendants
21 and hundreds of recruited "followers" executed a plan to recover the cattle by force, threats, and
22 intimidation. Defendants and their followers demanded that officers leave and abandon the cattle
23 and threatened to use force if the officers did not do so. The superseding indictment alleges armed
24 gunmen took sniper positions behind concrete barriers and aimed their assault rifles at the officers.
25 Defendants and their followers outnumbered the officers by more than 4 to 1, and the potential
26

27
28 ¹ By 2012, Bundy's cattle had multiplied and he also began grazing his cattle on land administered by the
NPS in the Lake Mead National Recreation Area without obtaining grazing permits or paying grazing fees.

1 firefight posed a threat to the lives of the officers, as well as unarmed bystanders which included
2 children. Thus, the officers were forced to leave and abandon the impounded cattle.

3 After the April 12, 2014 confrontation with federal officers, the superseding indictment
4 alleges that the leaders and organizers of the conspiracy organized armed security patrols and
5 check points in and around Cliven Bundy's Bunkerville ranch to deter and prevent any future law
6 enforcement actions against Bundy or his co-conspirators, and to protect Bundy's cattle from
7 future law enforcement actions.

8 **II. Procedural History**

9 Stewart was initially arrested on March 3, 2016, in the District of Idaho on a Superseding
10 Indictment (ECF No. 27) returned March 2, 2016 and warrant issued in this district. All 19
11 defendants made their appearances in this case in this district between March 4, 2016, and April
12 15, 2016. At the initial appearance of each defendant, the government stated its position that this
13 was a complex case that would require special scheduling review. All 19 defendants are currently
14 joined for trial pursuant to the provisions of the Speedy Trial Act. All 19 defendants have been
15 detained pending trial.

16 In an Order (ECF No. 198) entered March 25, 2016, the court directed the parties to meet
17 and confer as required by LCR 16-1 to discuss whether this case should be designated as complex,
18 and, if so, to attempt to arrive at an agreed-upon complex scheduling order addressing five
19 specified topics for discussion. The order gave the parties until April 18, 2016, to file a stipulated
20 proposed complex case schedule if all parties were able to agree, or if they were not, to file a
21 proposed schedule with supporting points and authorities stating each party's position with respect
22 to whether or not the case should be designated as complex, a proposed schedule for discovery,
23 pretrial motions, and trial, and any exclusions of time deemed appropriate under 18 U.S.C. § 3161.

24 A Proposed Complex Case Schedule (ECF No. 270) was filed on April 18, 2016. In it, the
25 government and 13 of the 19 defendants agreed that the case should be designated as complex.
26 The 13 defendants who stipulated to the proposed schedule included: Cliven Bundy, Mel Bundy,
27 Dave Bundy, Blaine Cooper, Gerald Delemus, O. Scott Drexler, Richard Lovelien, Steven Stewart,
28 Todd Engel, Gregory Burleson, Joseph O'Shaughnessy, Micah McGuire and Jason Woods. Three

1 defendants, Ammon Bundy, Peter Santilli, and Brian Cavalier, indicated that they would “defer
2 the decision to agree or disagree, pending further consultation with counsel and/or have taken no
3 position as to the filing of this pleading.” Three defendants, Ryan Bundy, Eric Parker, and Ryan
4 Payne, disagreed that the case should be designated as a complex case “to the extent time is
5 excluded under the STA.”

6 The same 13 defendants who initially stipulated that the case should be designated as
7 complex, agreed that the May 2, 2016 trial date should be vacated, and that the trial in this matter
8 should be set on the first available trial track beginning “in or around February 2017.” Three
9 defendants, Ammon Bundy, Peter Santilli, and Brian Cavalier, “deferred the decision to agree or
10 disagree about a trial date pending further consultation with counsel, or have not taken a position.”

11 The 13 defendants who stipulated the case should be designated as complex and a trial date
12 set in February 2017, stipulated “that all time from the entry of Defendants’ pleas in this case until
13 the trial of this matter is excluded for purposes of the STA pursuant to 18 U.S.C. § 3161(h)(7)(A)
14 as the ends of justice outweigh the interest of the public and the defendants in a speedy trial.”
15 Ammon Bundy, Peter Santilli and Brian Cavalier “deferred the decision to agree or disagree about
16 the exclusion of time, pending further consultation with counsel, or have taken no position on the
17 matter.” Ryan Bundy stated he disagreed “to the extent any exclusion of time denies him the right
18 to a speedy trial under the STA.” Eric Parker stated he disagreed “with no further position stated.”
19 Ryan Payne stated he disagreed “with the exclusion of time to the extent it denies him the right to
20 a speedy trial under the STA.”

21 The court held a scheduling and case management conference on April 22, 2016, to
22 determine whether this case should be designated as complex. Eighteen of the nineteen defendants
23 appeared with their counsel. Defendant Ryan Bundy appeared pro se with standby counsel, Angela
24 Dows. At the scheduling and case management conference on April 22, 2016, many of the
25 defendants who had initially stipulated to the complex case schedule and a February 2017 trial
26 date, changed positions. The positions of each of the defendants were stated on the record at the
27 hearing and memorialized in the court’s Case Management Order (ECF No. 321) entered April 26,
28 2016. The court found the case was a complex case within the meaning of 18 U.S.C. §

1 3161(h)(7)(B)(ii), and set the trial for February 6, 2017. The case management order made
 2 findings concerning why this case was deemed complex within the meaning of 18 U.S.C. §
 3 3161(h)(7)(B), and the court's findings on exclusion of time for purposes of the Speedy Trial Act.
 4 The case management order also set deadlines for filing motions to sever, motions for filing pretrial
 5 motions and notices required by Rule 12 of the Federal Rules of Criminal Procedure², and LR
 6 12(1)(b). No defendant filed objections to the determination that this case was complex, the court's
 7 Speedy Trial Act tolling and exclusion findings, or any other provision of the court's case
 8 management order.

9 **III. The Parties' Positions**

10 **A. The Motion to Sever**

11 Stewart seeks an order severing his trial from the trial of all of his co-defendants arguing
 12 that a joint trial: will violate his Sixth Amendment right to confront witnesses against him; violate
 13 his Fifth Amendment right to due process; and at a joint trial, one or more co-defendants will
 14 present a mutually exclusive and/or impermissibly antagonistic defense to Stewart's trial defense.
 15 The superseding indictment alleges that Stewart was a resident of Idaho who traveled to Nevada
 16 and acted as a gunman. However, the superseding indictment does not list any specific
 17 communications with Stewart or any of his 18 co-defendant. Additionally, the indictment does
 18 not list any overt acts between Stewart and any of his co-defendants. Stewart is not charged in
 19 Counts 4, 7, 10, 11, and 13.

20 He is unable to state the grounds necessitating severance because discovery in this case is
 21 voluminous, and he has not had an opportunity to review and analyze *Bruton* issues and mutually
 22 exclusive and/or impermissibly antagonistic defenses. Additionally, the government has not
 23 disclosed all of the relevant discovery to the defense, or identified which of the co-defendants'
 24 statements, if any, it intends to introduce at trial. However, he has been able to identify inculpatory
 25 statements of co-defendants Brian Cavalier, Todd Engel, Cliven Bundy, Scott Drexler, and Eric
 26 Parker that he believes may prejudice him. Specifically, Brian Cavalier is alleged to have made a
 27 statement to the effect that several individuals did not want the standoff to end peacefully. Todd

28 ² All references to a "Rule" or the "Rules" refer to the Federal Rules of Criminal Procedure.

1 Engel is alleged to have made a statement that people came looking for a fight, and a flanking
2 militia element made the BLM really nervous.

3 Cliven Bundy told cowboys to “go get our cows back.” Posts on Stewart’s Facebook page
4 contain statements of co-defendant Scott Drexler about using bridges to shut down the freeway.
5 Eric Parker’s Facebook page posted a statement to the effect that people were calling Stewart a
6 Bundy sniper. Parker’s Facebook page said his buddy Steven Stewart had to relay to Parker what
7 was going on through the binoculars which were not much good that far away, and that Stewart
8 told Parker “exactly what they were doing after the snipers had been green lighted.”

9 Stewart anticipates that discovery may reveal other statements of his co-defendants that
10 may implicate the *Bruton* rule and his Sixth Amendment right under the Confrontation Clause. He
11 has not had an opportunity to review all of the discovery, so he is not in a position to identify with
12 particularity the propriety of severance in this case, and requests an opportunity to supplement his
13 motion.

14 He also argues he will suffer prejudicial spillover in a joint trial with a trial of his co-
15 defendants, and that in a complex case like this one, the jury may not be able to compartmentalize
16 evidence offered against the respective co-defendants. Not all of the co-defendants are named in
17 each count. The government’s proof at trial will therefore not be identical for each co-defendant.
18 This prejudice will be compounded if the government seeks to admit a co-defendant’s statements
19 against another co-defendant. At this time, his trial defense is innocence. Because of the volume
20 of discovery and his inability to ascertain whether the co-defendants’ defenses will be mutually
21 exclusive or impermissibly antagonistic to him, he raises this as a possible ground in an abundance
22 of caution to preserve the issue for future review. He asks leave to supplement his motion to sever
23 once the defense has completed its discovery review so he may identify the evidence that supports
24 severance of his trial from the trial of his co-defendants.

25 **B. The Government’s Response**

26 The government opposes the motion arguing the crimes charged in the superseding
27 indictment involve a continuing conspiracy to impede and interfere with federal law enforcement
28 officers. This conspiracy began in at least March 2014, and continued through March 2016, when

1 the superseding indictment was returned. The superseding indictment alleges that during the
2 course of the conspiracy, defendant Cliven Bundy led a criminal enterprise to prevent federal law
3 enforcement officers from taking actions to enforce federal court orders that required the removal
4 of his cattle that had been grazing on public lands unlawfully for more than 20 years. This
5 enterprise was conducted through threats of force and violence, actual force and violence, assault,
6 and extortion.

7 The superseding indictment alleges that Cliven Bundy began recruiting the members of the
8 conspiracy in March 2014, using social medial to call for gunmen and others to come to
9 Bunkerville, Nevada, the site of the impoundment, to physically confront, impede and interfere
10 with law enforcement officers as they were executing their duties to enforce federal court orders.
11 Ultimately, over 400 of Bundy's followers converged on the site where the officers were
12 impounding cattle on April 12, 2014. The government claims that over 60 of Bundy's followers
13 were either carrying, using, or brandishing firearms, including assault rifles, as they converged on
14 the gate and blocked the entrance to the impoundment site which was guarded by approximately
15 40 law enforcement officers. The government also maintains that the conspiracy continued after
16 April 12, 2014, because conspirators took concerted action to protect Bundy's cattle from future
17 impoundment and to prevent law enforcement actions against Cliven Bundy.

18 Cliven Bundy, along with his sons Ammon Bundy and Ryan Bundy, and co-Defendants
19 Peter Santilli and Ryan Payne, are charged in all 16 counts of the indictment. Cliven Bundy, Ryan,
20 Ammon, Mel, and Dave Bundy are alleged to be leaders and organizers of the conspiracy along
21 with co-Defendants Ryan Payne and Peter Santilli. Defendants Blaine Cooper, Brian Cavalier,
22 Joseph O'Shaughnessy and Gerald Delemus are alleged to be mid-level leaders and organizers of
23 the conspiracy. The remaining defendants, Eric Parker, O. Scott Drexler, Steven Stewart, Richard
24 Lovelien, Todd Engel, Gregory Burleson, Micah McGuire and Jason Woods were gunmen.

25 The superseding indictment alleges that Cliven Bundy was the leader, organizer, and chief
26 beneficiary of the conspiracy who possessed ultimate authority over the scope, manner and means
27 of conspiratorial operations. He also received the economic benefits of the extortion plead in the
28 indictment.

1 The government points out that it made its initial disclosures to the defendants on May 6,
2 2016, pursuant to the court's Case Management Order (ECF No. 321). The initial disclosures
3 included the Rule 16 statements of the defendants and other Rule 16 information and materials.
4 The government is withholding disclosure of Jencks materials until 30 days before trial because of
5 serious concerns for witness safety and security.

6 The government maintains that all of the defendants were appropriately joined for trial
7 pursuant to Fed. R. Crim. P. 8(b) and 14(a). These rules are designed to avoid multiple trials and
8 promote judicial economy and efficiency. Defendants charged together and properly joined under
9 Rule 8(b) are generally tried together. Joinder is "particularly appropriate" in a conspiracy case
10 where all of the co-defendants are members of a conspiracy. The concern for judicial efficiency
11 is less likely to be outweighed by possible prejudice to the defendants in a joint trial of a conspiracy
12 case because much of the evidence would be admissible against each defendant in separate trials.
13 Joint trials provide the jury with an ability to see the entire picture of the alleged crime, and enable
14 the jury to reach a more reliable conclusion as to the guilt or innocence of the defendants involved.
15 Joint trials also limit the burden of requiring witnesses or victims to testify on multiple occasions
16 in separate trials and avoid "randomly favoring the last-tried defendants who have the advantage
17 of knowing the prosecution's case beforehand."

18 The government cites United States Supreme Court and Ninth Circuit authority holding
19 that a party seeking severance must show unusual circumstances in which a joint trial would be
20 "manifestly prejudicial" to warrant severance. This is a high standard which can be met if a
21 defendant demonstrates that his specific trial rights are compromised, or where a jury would be
22 unable to reach a reliable verdict without severance. It requires a showing that a joint trial would
23 be so prejudicial that it would deprive the defendant of a fair trial. A showing that jointly charged
24 defendants have varying degrees of culpability or that there is an improved possibility of acquittal
25 in a separate trial is insufficient to warrant severance.

26 The government argues that Stewart is charged as a gunman in the conspiracy. Therefore,
27 all of the evidence concerning his participation in the conspiracy, and the participation of others
28 in the conspiracy, is admissible against him. The superseding indictment does not charge any overt

1 acts that are not legally attributed to Stewart as a member of the conspiracy, regardless of when he
 2 joined or his role in the conspiracy. Even if there is some “modicum of evidence” that is not
 3 admissible against Stewart, but is admissible against his co-defendants, Stewart has not shown that
 4 a limiting instruction is insufficient to cure any alleged prejudice. The government characterizes
 5 his argument that a joint trial will expose the jury to antagonistic defenses as a “throw away claim.”
 6 Stewart has offered nothing specific and “attempts to conjure up nothing more than speculation.”
 7 Stewart admits that a general denial of guilt is not an antagonistic defense, and he has offered
 8 nothing more than that in his motion. The government therefore asks that the court deny his motion
 9 to sever.

10 **C. Stewart’s Reply**

11 Stewart replies that there is a split of authority on whether *Bruton* narrowly applies only to
 12 testimonial statements. The Ninth Circuit has held that *Bruton* applies to statements that violate
 13 the Confrontation Clause because the Supreme Court held in *Crawford v Washington*, 541 U.S.36,
 14 51 (2004) that the Confrontation Clause bars only “testimonial” out-of-court statements. He
 15 believes that if he is tried with his co-defendants he will be denied cross examination of powerfully
 16 incriminating extrajudicial statements outlined in his motion. Even though the statements made
 17 by Drexler and Parker were made on Facebook, Stewart claims they are “testimonial”.

18 **D. The Government’s Motion to Supplement Responses**

19 The Government’s Motion to “Supplement” (ECF No. 971) acknowledges that the
 20 government filed oppositions to each of the defendants’ severance motions, arguing that the nature
 21 of the allegations and charges made this case appropriate for joinder and that defendants had not
 22 shown a joint trial would manifestly prejudice them. *Id.* at 6. The governments’ responses
 23 objected to individual trials, and did not propose an alternative to a single 19-defendant trial.³ *Id.*
 24 The government states it took this position because, when it filed its oppositions to the motions to
 25 sever, it was unclear whether all of the defendants would be available for the February 2017 trial
 26 as a number of defendants were also charged in the District of Oregon and awaiting trial. The

27
 28 ³ Two of the 19 defendants, Gerald A. Delemus and Blaine Cooper, have now resolved their cases by entering guilty pleas.

1 charges against the defendants who were also charged in the District of Oregon have now been
 2 resolved, and all of the remaining 17 defendants will be available for the trial set in February 2017.
 3 The government has concluded that there is little likelihood that any more defendants will resolve
 4 their case short of trial. The government therefore seeks leave to submit a supplemental response
 5 to defendants' severance motions and its own request and proposal for severance.

6 The government now argues the court should exercise its inherent authority to manage its
 7 docket and order severance because a joint trial of all 17 remaining defendants would unreasonably
 8 increase the amount of time it takes to try all defendants, result in greater delay, confusion and
 9 difficulty in maintaining an orderly and efficient proceeding. It seeks to align defendants into
 10 proposed groupings of three-tiers for three separate trials:

- 11 • **Tier 1 – Leaders and Organizers:** Defendants Cliven Bundy, Ryan Bundy, Ammon
 12 Bundy, Peter Santilli, and Ryan Payne.
- 13 • **Tier 2 – Mid-level Leaders and Organizers and Follower-Gunmen:** Defendants Dave
 14 Bundy, Mel Bundy, Joseph O'Shaughnessy, Brian Cavalier, Jason Woods and Micah
 15 McGuire.
- 16 • **Tier 3 – Follower-Gunmen:** Defendants Ricky Lovelien, Todd Engel, Gregory Burleson,
 17 Eric Parker, O. Scott Drexler, and Steven Stewart.

18 Citing *United States v. Taylor-Prigge*, 830 F.3d 1094, 1098 (9th Cir. 2016) and *United*
 19 *States v. Mancuso*, 130 F.R.D. 128, 130 (D. Nev. 1990), the United States argues that severance is
 20 justified where a joint trial would cause manifest prejudice, or irrespective of prejudice, interfere
 21 with the court's inherent authority to manage its docket, or both. The government continues to
 22 maintain that there would be "no material prejudice attached to the joinder of the defendants here
 23 because the charged offenses all arise from a common nucleus of operative fact, and because there
 24 is no serious risk of prejudicial 'spillover' of otherwise admissible evidence." However, the
 25 government now seeks severance under the second *Mancuso* factor to allow the district court to
 26 control its docket. The government argues that a single 17-defendant jury trial, which none of the
 27 defendants initially requested, would unreasonably increase the time it takes to try all of the
 28 defendants, result in a greater risk of delay, confusion, and difficulty in maintaining an orderly and

1 efficient proceeding. The government estimates that a 17-defendant trial would, under the best
2 circumstances, likely take between 4 and 6 months to complete, and require the government to call
3 between 60 and 75 witnesses. Cross-examination of each of these witnesses by 17 separate defense
4 counsel would unreasonably extend the length of the trial. Additionally, a joint trial would likely
5 result in delays based on scheduling difficulties and conflicts attendant to so large a number of
6 defendants and their counsel. Under these circumstances, the court may exercise its inherent
7 powers to fashion efficient, smaller trials from an otherwise unwieldy, mass, joint trial.

8 The government continues to maintain that 17 separate trials would also unreasonably
9 increase the total time required to try all defendants. The government estimates that individual
10 trials would take a minimum of 3 to 4 weeks each, requiring the government to call from 30 to 45
11 witnesses to present its case-in-chief for each of the 17 trials, and potentially 17 months to
12 complete all 17 trials. More importantly to the government, separate trials will unreasonably
13 subject victims to being “re-victimized time and again as they are forced to retell the violence and
14 threats of death and bodily injury they faced on April 12, 2014.” The government therefore
15 submits its 3-tier severance plan is an attempt to strike a reasonable balance between these two
16 otherwise unreasonable alternatives.

17 The government argues that its 3-tier proposal groups the defendants in a way that
18 “conforms conceptually to their roles in the conspiracy and aligns with the evidence the
19 government anticipates offering at trial.” The defendants in Tier 1 are the leaders and organizers
20 who were involved in most, or all of the critical events leading to the April 12, 2014 assault. This
21 includes the March 28, 2014 blocking of the BLM convoy; the April 2, 2014 threats and
22 interference with the Utah auction barn; the April 8, 9, and 10, 2014 calls to arms; the April 9,
23 2014 “ambush” of the BLM convoy; the April 9, 2014 threats and interference with the Utah
24 auction barn, the April 11, 2014 threat against the impoundment special agent in charge; and the
25 April 12, 2014 assault.

26 The same is not true of the Tier 3 defendants who are identified as follower-gunmen, whose
27 involvement in the conspiracy is restricted more to their actions during the assault on April 12,
28 2014. Similarly, the Tier 2 defendants are identified as mid-level leaders and organizers whose

1 leadership roles involve their “actions on the ground during the April 12, 2014 assault, and less by
2 their pre-assault activities.”

3 The government expects that at a trial of the Tier 1 defendants, it would offer more
4 evidence of the details of the broader conspiracy and the defendants’ leadership roles in the
5 conspiracy. While evidence of the broader conspiracy is equally admissible against Tier 2 and 3
6 defendants, in separate trials, the government would offer this evidence in summary, rather than
7 in detailed form, simply to provide context for the events of April 12, 2014.

8 The government indicates it is likely to offer more evidence regarding the details of
9 individual movements of Tier 2 and 3 defendants through the wash and over the bridges during
10 the assault to demonstrate their concert of action and intent. By contrast, a trial of the Tier 1
11 defendants would focus less on the individual movements of the gunmen and on-the-ground
12 leaders, and more on the mass movements of the followers against the BLM position. These
13 examples point out the efficiencies that would be gained through a tiered trial presentation of the
14 3 proposed groupings.

15 The government proposes that the cases be tried seriatim, *i.e.*, three trials with intervals of
16 4 to 6 weeks between each trial. The government has proposed the tiers because the Tier 1
17 defendants have the most involvement in the broader conspiracy and therefore, greater culpability
18 and responsibility for the actions charged on April 12, 2014. To invert the order would produce
19 “the anomalous and less fair result of trying less culpable actors before the more culpable ones.”

20 The government anticipates that some of the defendants who are not in Tier 2 or 3 may
21 demand that they be tried following other defendants suddenly complaining that they are not ready
22 for trial in February 2017. If these arguments are made, the government will respond, but argues
23 that the defendant should not be allowed to “game the order of the proposed trials using the speedy
24 trial act”, or through seeking a continuance to accommodate late-in-the-game trial preparation.
25 With respect to the defendants’ anticipated speedy trial arguments, the government cites U.S.C. §
26 3161(h)(7)(B)(ii) which gives the court authority to exclude time on its own motion where the case
27 is “so unusual or complex due to the number of defendants.”
28

1 “transaction” is interpreted flexibly, and determining whether a “series” exists depends on whether
 2 there is a “logical relationship” between the transactions. *Id.* “A logical relationship is typically
 3 shown by the existence of a common plan, scheme, or conspiracy.” *Id.* at 844 (internal citations
 4 omitted). A logical relationship may also be shown if the common activity constitutes a substantial
 5 portion of the proof of the joined charges. *Id.*

6 **B. Rule 14: Severance**

7 Rule 14 governs the severance of both defendants and charges. *Id.* at 845. Even where
 8 joinder is proper under Rule 8(a), the court may order separate trials of counts or provide other
 9 relief that justice requires if joinder “appears to prejudice a defendant or the government.” Fed.
 10 R. Crim. P. 14(a). The court’s power to order severance “rests within the broad discretion of the
 11 District Court as an aspect of its inherent right and duty to manage its own calendar.” *United*
 12 *States v. Gay*, 567 F.2d 916, 919 (9th Cir. 1978). The court’s denial of a motion to sever is
 13 reviewed for abuse of discretion. *Prigge*, 830 F.3d at 1098.

14 The defendant seeking severance bears the burden of showing undue prejudice of such a
 15 magnitude that, without severance, he will be denied a fair trial. *See United States v. Jenkins*, 633
 16 F.3d 788, 807 (9th Cir. 2011). Prejudice may arise where: (a) the jury could confuse and cumulate
 17 the evidence of one charge to another; (b) the defendant could be confounded in presenting his
 18 defenses (*i.e.*, where a defendant wishes to testify in his own defense on one count but not another);
 19 and (c) the jury could erroneously conclude the defendant is guilty on one charge and therefore
 20 convict him on another based on his criminal disposition. *United States v. Johnson*, 820 F.2d 1065,
 21 1070 (9th Cir. 1987). However, if there is a risk of prejudice, the trial court can neutralize the risk
 22 with appropriate jury instructions, and “juries are presumed to follow their instructions.” *See, e.g.*,
 23 *Zafiro v. United States*, 506 U.S. 534, 540 (1993); *Vasquez-Velasco*, 15 F.3d at 847 (collecting
 24 cases regarding jury instructions concerning compartmentalizing evidence and spillover
 25 prejudice); *United States v. Patterson*, 819 F.2d 1495, 1503 (9th Cir.1987) (severance is
 26 unnecessary when the trial court carefully instructs the jury “because the prejudicial effects of the
 27 evidence of co-defendants are neutralized”).
 28

1 Rule 14 does not require severance even if prejudice is shown; rather, the rule leaves the
 2 tailoring of the relief to be granted, if any, to the district court's sound discretion. *Zafiro*, 506 U.S.
 3 at 538–39. The Ninth Circuit has explained that Rule 14 sets a high standard for showing prejudice
 4 “because some prejudice is inherent in any joinder of defendants, if only ‘some’ prejudice is all
 5 that need be shown, few, if any, multiple defendant trials could be held.” *United States v. Vaccaro*,
 6 816 F.2d 443, 448 (9th Cir. 1987), *abrogated on other grounds by Huddleston v. United States*,
 7 485 U.S. 681 (1988). The test for determining abuse of discretion in denying severance under
 8 Rule 14 is “whether a joint trial was so manifestly prejudicial as to require the trial judge to exercise
 9 his discretion in but one way, by ordering a separate trial.” *Jenkins*, 633 F.3d at 807 (citing *United*
 10 *States v. Decoud*, 456 F.3d 996, 1008 (9th Cir. 2006)).

11 Notably, the Ninth Circuit had acknowledged that a joint trial is “particularly appropriate”
 12 when defendants are charged with conspiracy. *Id.* (citing *Zafiro*, 506 U.S. at 536–37). This is so
 13 “ ‘because the concern for judicial efficiency is less likely to be outweighed by possible prejudice
 14 to the defendants when much of the evidence would be admissible against each of them in separate
 15 trials’ .” *United States v. Boyd*, 78 F. Supp. 3d 1207, 1212 (N.D. Cal. 2015) (quoting *United States*
 16 *v. Fernandez*, 388 F.3d 1199, 1242 (9th Cir. 2004)).

17 **C. The *Bruton* Rule**

18 In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a defendant's
 19 Sixth Amendment right to confront and cross-examine witnesses is violated when a facially
 20 incriminating confession of a non-testifying co-Defendant is introduced at a joint trial, even if the
 21 jury is instructed to consider the confession only against the co-defendant. To violate the
 22 Confrontation Clause, the co-defendant's confession must directly incriminate the objecting
 23 defendant. *Id.* at 126. However, the Supreme Court later held that “the Confrontation Clause is
 24 not violated by the admission of a non-testifying co-defendant's confession with a proper limiting
 25 instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any
 26 reference to his or her existence.” *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). In *Richardson*,
 27 the Supreme Court declined to extend the *Bruton* doctrine to “confessions incriminating by
 28 connection.”” *Id.* at 209.

1 A properly redacted confession of a co-defendant does not violate the Confrontation Clause
 2 if the confession does not refer to the defendant. *Mason v. Yarborough*, 447 F.3d 693, 695–96
 3 (9th Cir. 2006). However, the redacted confession may not reference the co-defendant by
 4 implication, for example, by replacing a name with an obvious blank space or symbol or word
 5 such as “deleted.” *Gray v. Maryland*, 523 U.S. 185, 196–97 (1998).

6 In *United States v. Parks*, 285 F.3d 1133 (9th Cir. 2002), the Ninth Circuit held that the
 7 trial court erred in admitting an improperly redacted confession which included the term “they” in
 8 various places from which the jury could infer the existence of a third accomplice. Parks and co-
 9 defendant Williams were tried and convicted of bank robbery committed by three individuals. Co-
 10 defendant Williams gave a statement to the FBI which was admitted in redacted form at trial.
 11 Williams confessed to the robbery and stated Parks was the individual who collected the money
 12 inside the bank. Although all portions of the statement in which Williams made any reference to
 13 Parks or the two of them acting together were redacted, two sentences contained the word “they,”
 14 indicating at least two other individuals were involved other than Williams. The Ninth Circuit
 15 found that the jury would naturally conclude that Parks was the name redacted from the confession.
 16 “The combination of an obviously redacted statement with the language implying the existence of
 17 a third person reasonably could leave the jury to conclude that the unnamed third person must be
 18 the co-defendant before them.” *Id.* at 1139. The court held that admission of Williams’ redacted
 19 statement was error. However, after an exhaustive review of the record it determined that the error
 20 was harmless beyond a reasonable doubt because there was substantial evidence of Parks’ guilt.
 21 *Id.* at 1139–40.

22 **D. Antagonistic Defenses**

23 Antagonistic defenses, “or the desire of one defendant to exculpate himself by inculpating
 24 a co-defendant,” is not sufficient to require severance. *United States v. Throckmorton*, 87 F.3d
 25 1069, 1072 (9th Cir. 1996) (citing *United States v. Sherlock*, 962 F.2d 1349, 1363 (9th Cir. 1992)).
 26 A defendant will only be entitled to severance based on mutually antagonistic defenses if “the core
 27 of the co-defendant’s defense is so irreconcilable with the core of his own defense that the
 28 acceptance of the co-defendant’s theory by the jury precludes acquittal of the defendant.” *United*

1 *States v. Cruz*, 127 F.3d 791, 799 (9th Cir. 1997) (quoting *Throckmorton*, 87 F.3d at 1072); *see*
 2 *also United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991) (mutually exclusive defenses
 3 said to exist when acquittal of one co-defendant would necessarily call for the conviction of the
 4 other); *United States v. Hernandez*, 952 F.2d 1110, 1116 (9th Cir. 1991) (to obtain severance on
 5 basis of antagonistic defenses, defendant must show that acceptance of one party's defense will
 6 preclude acquittal of the other party). The district court may also "reduce any potential confusion
 7 between the defendants by instructing the jury that it should evaluate the evidence against each
 8 defendant separately and that the verdict as to one defendant should not control the verdicts of the
 9 others." *Id.* at 800 (citing *Zafiro*, 506 U.S. at 540–41).

10 **E. Severance for Favorable Testimony from Co-Defendants**

11 A defendant who moves for severance to obtain favorable testimony from a co-defendant
 12 must show the following: (1) he would call the co-defendant at the severed trial; (2) that the co-
 13 defendant would in fact testify; and (3) that the testimony would be favorable to him. *United*
 14 *States v. Jenkins*, 785 F.2d 1387, 1393–94 (9th Cir. 1986) (citing *United States v. Seifert*, 648 F.2d
 15 557, 563 (9th Cir. 1980)); *see also United States v. Mayo*, 646 F.2d 369, 374 (9th Cir. 1981). The
 16 district court then must consider "the weight and credibility of the proposed testimony and the
 17 economy of severance." *United States v. Castro*, 887 F.2d 988, 998 (9th Cir. 1989). It is
 18 insufficient to state that a co-defendant "likely" would offer exculpatory testimony at a separate
 19 trial. *Id.* Additionally, it is well settled that "a defendant has no absolute right to elicit testimony
 20 from any witness, co-defendant or not, whom he may desire." *Gay*, 567 F.2d at 919; *United States*
 21 *v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974). Any witness may invoke his Fifth Amendment
 22 privilege against self-incrimination and refuse to testify. *Gay*, 567 F.2d at 919.

23 **F. Severance for Judicial Economy**

24 A number of circuit courts of appeal, including the Ninth Circuit, have recognized that the
 25 district court has broad discretion to organize the size of its cases in the interest of judicial economy
 26 and case management. *See, e.g., United States v. Kennedy*, 564 F.2d 1329, 1334 (9th Cir. 1997);
 27 *United States v. Casamento*, 887 F.2d 1141, 1151–53 (2nd Cir. 1989); *United States v. Moya-*
 28 *Gomez*, 860 F.2d 706, 754 (7th Cir. 1988). Many district courts have recognized the court's

1 inherent authority to manage its case load and to sever in the interest of efficient administration of
2 justice and judicial economy. *See, e.g., United States v. Mancuso*, 130 F.R.D. 128 (D. Nev. 1990);
3 *United States v. Gallo*, 668 F. Supp. 736, 754–58 (E.D.N.Y. 1987), *aff’d* 863 F.2d 185 (2nd Cir.
4 1988), *cert. denied*, 489 U.S. 1083 (1989).

5 In *Mancuso*, 130 F.R.D. 128, Judge Reed recognized the general rule that defendants
6 jointly indicted should ordinarily be tried together, and that co-conspirators in a conspiracy case
7 should ordinarily be tried together. *Id.* at 130–31. However, his decision thoughtfully reviewed
8 and considered the difficulties of a joint trial in a complex multi-defendant case. The decision
9 pointed out that a complex multi-defendant case is “fraught with problems.” *Id.* at 131. He
10 recognized that a single trial of a complex multi-defendant case imposes enormous burdens on the
11 defendants, defense counsel, prosecutors, jurors, the court, and the judge. *Id.* Dozens of people
12 are required to be in court every day. *Id.* Therefore, the absence of any one person may bring the
13 entire trial to a screeching halt. *Id.* Complex multi-defendant cases involve reconciling the
14 individual calendars of the prosecutors and each defense attorney with the court’s docket. *Id.*
15 Attorneys carrying a full case load have conflicts with other trials, and the longer the case lingers,
16 the more pronounced these conflicts become. *Id.* Judge Reed noted that a lengthy trial of multiple
17 defendants creates a unique hardship on each party involved. Jurors spend months away from their
18 daily lives, defendants are required to endure months of pretrial incarceration before their case is
19 finally adjudicated, and often significant amounts of time-consuming evidence are presented
20 which are unrelated to a particular defendant. *Id.* Attorneys are unable to spend significant time
21 on their remaining cases. *Id.* The court is forced to expend an exorbitant amount of time on a
22 single case, and other litigants must “queue up for the remaining courtrooms.” *Id.* The result is a
23 strain on the court’s docket and unconscionable delays of all other cases. *Id.*

24 *Mancuso* also recognized the personal strain on the trial judge in a long complex case. The
25 trial court is required to make rulings as issues come up which often require frequent adjournments
26 necessitated by unavoidable problems associated with multiple jurors, multiple defendants, and
27 their counsel as well as the witnesses and courtroom personnel who are required to be present at
28 all times. *Id.*

II. Analysis & Decision

The court's case management order set an early deadline for filing motions to sever because, at the case management conference conducted on April 22, 2016, counsel for Dave Bundy stated he would be filing a motion to sever on behalf of his client. An early deadline was set so that the court could evaluate if there was some consensus among the defendants concerning severance. There was not. In their motions to sever, the defendants argued that the deadline for filing motions to sever was premature because voluminous discovery had been produced by the government shortly before the deadline for filing the motions. Virtually all of the defendants' motions to sever indicated they needed time to review the discovery to provide more specific support for their request to sever. Almost all of the defendants asked for leave to supplement their motions to sever after an adequate time to review discovery. As a result, the court held off deciding the motions to sever the defendants filed.

On November 13, 2016, the government filed what it called a "supplement" to its responses to defendants' motions to sever, and its own motion to sever the defendants into three tiers for trial. *See* ECF No. 971. The government's supplement and motion to sever was filed shortly after the acquittal of the defendants who were also charged in the Oregon prosecution. It is clear to the court this is no coincidence. Clearly, the government expected a different result. Clearly, the government believed that a different outcome of some or all of the Oregon defendants' case would prompt non-trial dispositions in this case. The government's motion was not timely filed. Payne and counsel for other co-defendants correctly point out that the case management order required the government to comply with the same deadline for filing motions to sever as the defendants. However, virtually all of the defendants stated they were unable to support their motions to sever by the initial deadline because they had not had an adequate opportunity to review the discovery. Virtually all of the defendants asked for leave to supplement their motions to sever after reviewing the government's voluminous discovery. All of the defendants have now had more than six months to review discovery in this case, yet none of the defendants have supplemented their motions with any specific support for severance based on *Bruton* concerns, or antagonistic or mutually exclusive defenses. None of the defendants have met their burden of establishing that they would call a co-

1 defendant in a severed trial, that a co-defendant would in fact testify, and that co-defendant's
2 testimony would be favorable.

3 The defendants are also correct that the government has changed its position regarding
4 severance. In opposing the defendants' motions to sever, the government argued that all 19
5 defendants were appropriately joined for trial and had not shown that a joint trial would be
6 manifestly prejudicial. The government's responses to the various defense motions argued that
7 this was a conspiracy case, and therefore the paradigm case for a joint trial. The government's
8 responses also argued that the defendants had not met their burden of establishing that any *Bruton*
9 issues, mutually exclusive defenses, or antagonistic defenses precluded a joint trial. Similarly, the
10 government argued that none of the defendants had met their burden of establishing that any co-
11 defendant would testify in a severed trial. The government now argues that joinder of all of the
12 defendants was and is still appropriate and has resulted in efficiently getting this case ready for
13 trial. However, the government now argues that a 17-defendant trial would be too unwieldly. The
14 government asks that the court sever the trial into three groups in the interests of judicial economy
15 and efficient case management. The three tiers suggested correspond to what the government
16 believes the individual defendants' roles in the offenses charged in the indictment were. The three
17 groups are: Tier 1 – Cliven Bundy, Ryan Bundy, Ammon Bundy, Peter Santilli, and Ryan Payne;
18 Tier 2 – Dave Bundy, Mel Bundy, Joseph O'Shaughnessy, Brian Cavalier, Jason Woods, and
19 Micah McGuire; and Tier 3 – Richard Lovelien, Todd Engel, Gregory Burleson, Eric Parker, O.
20 Scott Drexler, and Steven Stewart.

21 The defendants have also changed their positions with respect to severance. The majority
22 of the defendants filed motions to sever requesting individual trials. Ammon Bundy and Ryan
23 Bundy argued that all of the Bundy brothers should be tried together. Mel Bundy initially indicated
24 he was not willing to be tried with his other brothers. Now that the government is seeking a
25 severance of this case into three separate trials, the majority of the defendants now want a joint
26 trial. Because the court has already indicated that severance will be ordered, the majority of the
27 defendants want to be tried first. A number of defendants who had previously asked to be severed
28 and tried individually now take the position that being tried on February 6, 2017, outweighs their

1 desire to be severed. Those defendants are Eric Parker, Richard Lovelien, Steven Stewart, Joseph
2 O'Shaughnessy, Micah McGuire, and Jason Woods. Some of the defendants are amenable to
3 going to trial with any group of co-defendants as long as they are in the first group set for trial.

4 In light of the court's indication that the trial would be severed, Ammon and Ryan Bundy
5 requested in their supplements that they be moved to a later group for trial because they have
6 recently returned from defending themselves in Oregon. Brothers Mel Bundy and Dave Bundy
7 want to go to trial first.

8 Cliven Bundy initially asked the court to sever his case from the trial of all of his co-
9 defendants. His response to the government's motion to supplement now states the opposite. He
10 now seeks a joint trial. His response to the government's proposal argues it is the responsibility
11 of the court to ensure a venue for a joint trial of all 17 defendants. He asks the court to prove it is
12 not logistically possible to try all 17 defendants in a joint trial. However, if the court is not going
13 to hold a joint trial, he asks that he be severed and tried last. During oral argument on December
14 9, 2016, counsel for Bundy stated that he was requesting to go last if any severance was ordered
15 because he expects the defendants will be acquitted and he did not want his co-defendants and
16 their families and loved ones to undergo the hardship of waiting for trial.

17 During oral argument on December 9, 2016, counsel for the government argued that the
18 government's proposal was the most logical, would result in judicial economy, and conserve
19 resources. The court inquired of counsel for the government why it would be fair to make the
20 defendants in its proposed Tier 3 wait the longest for trial when these were the individuals the
21 government regarded as least culpable. Counsel for the government responded that the sequence
22 of the trial suggested would, in counsel's view, be most logical and conserve resources because
23 trying the Tier 1 leaders and organizers first would give the court an overview of the entire case.
24 Additionally, trying the Tier 1 defendants first would likely resolve a number of legal issues that
25 could be applied to the defendants awaiting trial. The court inquired whether it made more sense
26 to try the Tier 3 defendants first as the evidence in that case would be narrower than the evidence
27 introduced in the trial of the Tier 1 and Tier 2 defendants. The government responded that it was
28

1 not “wed” to the sequence of the trials. However, government counsel believed trying the Tier 1
2 defendants first would be most efficient and conserve the most resources.

3 The court also inquired whether two trials, rather than three trials, would be more efficient.
4 The government responded that it would, of course, try the case in the manner in which the court
5 determined the case should be severed. However, the government believed that a joint trial of the
6 Tier 1 and Tier 2 defendants would be cumbersome and involve a large number of limiting
7 instructions that the jury might find confusing.

8 The court will order severance in the interests of judicial economy and efficient case
9 management. The court finds that three trials in the groupings proposed by the government is the
10 most logical and will result in the most efficient manner of trying the 17 defendants awaiting trial
11 in this case. However, the court disagrees with the government that it would be less fair to try the
12 least culpable defendants first. The court will order that the Tier 3 defendants be tried first. These
13 are the defendants the government contends are the least culpable of the 3 groups of defendants.
14 In the absence of any compelling reasons for trying Tier 1 or Tier 2 defendants earlier, it seems
15 more fair to try the Tier 3 defendants first. The trial of the Tier 3 defendants will likely be a shorter
16 trial than the trial of either the Tier 1 or Tier 2 defendants. These defendants are primarily involved
17 with the events on April 12, 2014. They are not alleged to be involved in the broader overall
18 conspiracy, or events before or after April 12, 2014. Trial of the Tier 3 defendants will focus on
19 their individual positions and involvement in the events on April 12, 2014. Evidence of the
20 involvement and actions of those the government alleges are the leaders and organizers of the
21 conspiracy can be presented in more summary fashion in a trial of the Tier 3 defendants.

22 CONCLUSION

23 Having reviewed and considered all of the moving and responsive papers in connection
24 with the severance issue, the court agrees that the most logical, efficient, and manageable way to
25 try this case is to separate the defendants into three groups corresponding to their alleged roles in
26 the offenses charged in the superseding indictment.

27 ///

28 ///

IT IS ORDERED that:

1. The trial of the 17 defendants awaiting trial shall be severed into three groups for three separate trials consisting of:
 - a. Tier 1: Cliven Bundy, Ryan Bundy, Ammon Bundy, Peter Santilli, and Ryan Payne;
 - b. Tier 2: Dave Bundy, Mel Bundy, Joseph O'Shaughnessy, Brian Cavalier, Jason Woods, and Micah McGuire; and
 - c. Tier 3: Richard Lovelien, Todd Engel, Gregory Burleson, Eric Parker, O. Scott Drexler, and Steven Stewart.
2. The Tier 3 defendants will proceed to trial February 6, 2017.
3. The Tier 1 defendants will proceed to trial 30 days after the conclusion of the trial of the Tier 3 defendants.
4. The Tier 2 defendants will proceed to trial 30 days after the conclusion of the trial of the Tier 1 defendants.
5. All pending severance motions, responses, replies, supplements and joinders are terminated.
6. Any specific request for relief not addressed in this order is denied.

DATED this 12th day of December, 2016.


PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE